

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR.

JUDGMENT.

Nand Lal vs. Shree Chand & anr.

S.B. Civil Second Appeal No.163/1983 against the judgment and decree dated 5.8.1983 passed by the learned District Judge, Merta in Civil Regular Appeal No.55/76.

Date of Judgment: May 24, 2006.

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. Mordhwaj Raj Mehta, for the appellant.

REPORTABLE

BY THE COURT:

Heard learned counsel for the appellant as learned counsel Shri S.C. Maloo submitted that even after intimation to respondents, he has not given instructions to him in this appeal.

The plaintiff's suit for cancellation of the sale-deed and alleged partition was dismissed by the trial court by judgment and decree dated 11.8.1976. The appellate court also dismissed the appeal on 5.8.1983. Hence this second appeal.

Brief facts of the case are that according to the plaintiff, one plot was purchased by the plaintiff and defendant no.2 Udai Singh from one Bheru Singh by registered sale-deed dated 5.10.1959. The plaintiff and defendant no.2 constructed the house over the said plot. The plaintiff and defendant both were running a business of transport and, therefore,

were partners in the business. The business in partnership of the plaintiff and the defendant was closed in the year 1964 and both started their separate business of transportation. The house remained joint and in possession of the plaintiff and the defendant. The plaintiff and defendant both kept separate portion in their possession but without any partition. It was done for convenience only.

Defendant no.2 obtained one *Patta* for the said house by the order of the Gram Panchayat, Chacha by order dated 19.12.1964 after depositing *Patta* fees on 1.1.1965.

The defendant no.1's father Gulab Chand filed one suit for recovery of Rs.8100/- against defendant no.1 in the court of Civil Judge, Merta in the year 1964 and got the plaintiff and defendant no.2's house attached by moving application under Order 38 Rule 5 C.P.C. In that suit, defendant no.2 himself submitted objection against the attachment of the house and therein he admitted that defendant no.2 has only $\frac{1}{2}$ share in the house in dispute. The said reply was filed on 29.3.1965 by defendant no.2 in the suit filed by defendant no.1's father.

Despite all above and despite the fact that defendant no.1's father himself got the house in question attached and defendant no.2 disclosed that he has $\frac{1}{2}$ share in the house, defendant no.1 purchased the entire house from defendant no.2 by deed dated 31.3.1965 which was registered on 5.4.1965. Therefore, the entire transaction between defendant no.1 and defendant no.2 is collusive. The Gram Panchayat had no authority to issue *Patta* in favour of defendant because the

property was not vesting in the Gram Panchayat. The right of the plaintiff could not have been destroyed by this way by the defendants in Gram Panchayat. Therefore, the plaintiff filed the suit for cancellation of the sale-deed executed by defendant no.2 in favour of defendant no.1 and for cancellation of the *Patta* alleged to have been issued by the Gram Panchayat in favour of defendant no.2. The defendants submitted joint written statement. Both the defendants admitted that the plot was purchased by the plaintiff and defendant no.2 jointly from Bheru Singh. The plot remained in possession of the plaintiff and defendant no.2. The house was constructed by the plaintiff and defendant no.2. The defendants further admitted that business of the plaintiff and defendant no.2 was in partnership and both were using the house for their commercial purpose also. When the plaintiff and defendant no.2 separated their business, the house was given in share of defendant no.2 after valuing the entire property of the firm and after including the house value in the share of the both the plaintiff and defendant no.2. For that purpose, an agreement was executed between the plaintiff and defendant no.2 on 28.5.1964. Copy of the agreement was produced by the defendants before the trial court and it was submitted that the original agreement is lying in the office of the Collector, Nagaur for payment of stamp duty over it. Therefore, by virtue of the agreement dated 28.5.1964, defendant no.2 became the sole owner of the house, however, the defendants admitted the possession of the plaintiff in the house but with the plea that the possession of the plaintiff continued

because of the good relation of the plaintiff and defendant no.2 and, therefore, the plaintiff's possession is as of licensee.

According to the defendants since the defendants alone became owner of the entire house, therefore, he submitted application before the Gram Panchayat for obtaining *Patta* in the name of defendant no.2 alone and the *Patta* was issued by the Gram Panchayat as the plaintiff gave his consent for issuing *Patta* in the name of defendant no.2.

In the joint written statement filed by defendant no.1 and defendant no.2, it is stated by the defendants that defendant no.1 had no knowledge that in the suit filed by his father Gulab Chand, defendant no.2 submitted that defendant no.2 has $\frac{1}{2}$ share only. In the joint written statement, defendant no.1 submitted that defendant no.1 is not bound by the admission of defendant no.2 admitting his $\frac{1}{2}$ share only. It is also stated in the joint written statement of defendant no.1 and defendant no.2 that to save the house from attachment, defendant no.2 might have took false plea of joint house in collusion with the plaintiff. It is also stated that defendant no.1 is bonafide purchaser of the house in dispute, therefore, the plaintiff is not entitled for cancellation of the sale-deed executed by defendant no.2 as sole owner of the house and in favour of defendant no.1.

The plaintiff submitted rejoinder and stated that the defendant has not produced the original agreement dated 28.5.1964. The plaintiff also stated that defendant did not produce the original agreement dated 28.5.1964 before the Collector, Nagaur for payment of stamp duty.

According to the plaintiff, the plaintiff and defendant no.2 were doing business jointly. The plaintiff submitted that Mool Chand and Ganpat Singh who were also running the same type of business of transportation, they tried to separate the plaintiff and defendant from the business and because of their undue influence, the agreement dated 28.5.1964 was executed but on the same day when said Mool Chand and Ganpat Singh went away, the deed was executed by the plaintiff and defendant no.2. It is also submitted that despite the earlier deed dated 28.5.1964, wherein it is mentioned that the plaintiff and defendant no.2 separated their business, the business continued for some more time after 28.5.1964. According to the plaintiff, in view of the subsequent agreement cancelling earlier agreement, the former agreement is of no use. The plaintiff again submitted that the house was joint, has been admitted by defendant no.2 Udai Singh in the proceedings as back as on 15.2.1965 by submitting objection petition in the court of Civil Judge, Merta in a suit filed by the none else than the father of defendant no.1.

Issues were framed by the trial court to the effect (1) whether the house in dispute is joint property of of the plaintiff and defendant no.2 with $\frac{1}{2}$ share of each ?, (2) Whether the plaintiff is entitled to have the disputed property partitioned by metes and bounds and to obtain separate possession of his share ?, (3) Whether the agreement dated 28.5.1964 produced by defendant is inadmissible in evidence for want of registration and proper stamps ?, (4) Whether one more subsequent agreement was executed by the parties on 28.5.1964? If so what is its

effect?, (5) Whether both the sale-deeds dated 29.3.1965 and 28.5.1964 are null and void and voidable against the rights of plaintiff and he is entitled to have them so adjudged ? (6) Whether the defendant no.1 is a bonafide purchaser for value , if so what is its effect ? and (7) Whether the plaintiff relinquished his rights in disputed property and his present possession is that of a licensee of defendant no.2?

The trial court held that the house in dispute was the joint property of the plaintiff and defendant no.2. The plaintiff and defendant no.2 were doing the business in partnership. The partnership has been admitted by the plaintiff, therefore, he cannot deny the division of entire properties of the plaintiff and defendant no.2 including the house. The trial court relied upon the deed dated 28.5.1964 produced by the defendant which was treated as deed of partition by the trial court. The trial court also held that since the Patta was issued by the Gram Panchayat in favour of defendant no.2, therefore, it appears that the house fell in the share of defendant no.2. The trial court while deciding issue no.2 was of the view that the partition is equitable relief and discretionary relief and since the plaintiff did not disclose the two deeds dated 28.5.1964, therefore, he is guilty of suppressing the facts from the court and, therefore, the plaintiff cannot claim partition of the suit property. The trial court in view of the finding recorded on issue no.1 about the division of the properties between the plaintiff and defendant, also held that the plaintiff is not entitled to seek decree for partition again. The trial court accepted the agreement/partition deed

dated 28.5.1964 as a piece of evidence for collateral purpose and admitted it in evidence and relied upon. The trial court also held that Ex.3, produced by the plaintiff by which according to the plaintiff Ex.A.2, the partition deed has not been proved by the plaintiff, appears to have been executed because of undue influence. The trial court also held that defendant no.1 is bonafide purchaser of the house. The trial court held that it is necessary to decide whether the plaintiff is living in the house as licensee or not. On the basis of the decisions on various issues, the trial court dismissed the suit of the plaintiff by judgment and decree dated 11.8.1976.

The appeal was preferred by the plaintiff to challenge the judgment and decree of the trial court whereas defendant no.1 purchaser of the house submitted cross-objection. The appeal as well as cross-objection were dismissed by the appellate court by judgment and decree dated 5.8.1983. The first appellate court though dismissed the appeal of the plaintiff but while deciding the legality of Ex.3 produced by the plaintiff to counter the Ex.A.2 (partition deed/agreement b partition) held that Ex.3 dated 28.5.1964 by which it has been alleged that Ex.A.2 of the same date dated 28.5.1964 has been cancelled, as forged one. In view of the above finding, Ex.A.2 dividing the properties of plaintiff and defendant no.2 remains in force. The first appellate court also held that the said partition deed/agreement dated Ex.A.2 is admitted document, therefore, the house fell in the share of Udai Singh.

The first appellate court held that Ex.A.2 is a memo of partition

and is admissible in evidence despite the fact that the said deed has not been executed on stamps and is not registered. The first appellate court was also of the opinion that the said document can be looked into for collateral purpose. The first appellate court also held that even the possession of the property has not been delivered to defendant no.2 by the plaintiff, still the property stands partitioned and fell in the share of defendant no.2. The first appellate court did not find the admission of defendant no.2 in his objection petition against attachment of the house in dispute admitting the share of the plaintiff as fatal for the defendant no.2's claim of falling the house in his share. On the basis of the reasonings mentioned above, the appeal was dismissed by the first appellate court on 5.8.1983. Hence this second appeal.

It is submitted by the learned counsel for the appellant that the finding of fact about the original ownership of the plot and the house is in favour of the plaintiff-appellant. Both the courts below held that both the defendants admitted that the plot in dispute was purchased by the plaintiff and defendant no.2 and they constructed house over it. The core question involved in this appeal is whether the two courts below rightly held that the partition took place between the plaintiff and defendant for their properties including the house in dispute and thereby the defendant alone became the owner of the house. It is also submitted that the defendant never challenged the subsequent document dated 28.5.1964 by which the earlier document dated 28.5.1964 executed between the plaintiff and defendant no.2 was

cancelled. The defendant never submitted that the said document is forged one. It is also submitted that the two courts below failed to appreciate that the entire claim of the defendants is on the basis of Ex.A.2 dated 28.5.1964, the alleged partitioned deed. Both the courts below by admitting the document Ex.A.2 in evidence, in fact admitted the document for main purpose of declaring the defendant no.2's title in the suit property and both the courts below have not relied upon the document Ea.A.2 for any collateral purpose. Both the court below failed to draw distinction between the main purpose and collateral purpose for the document Ex.A.2. It is also submitted that admittedly, by deed of partition, executed not on stamps and not registered, cannot create or extinguish right of any party and in this case, cannot extinguish the right of the plaintiff nor create in favour of defendant no.2.

According to the learned counsel for the appellant, the entire transaction of obtaining the Patta from the Gram Panchayat and execution of the sale-deed in favour of defendant no.1 by defendant no.2 is fraudulent act and the two courts below failed to apply their minds on most important and relevant circumstances. It is submitted that the conclusion drawn by the two courts below from the facts and evidence, is not erroneous but perverse. The defendant no.2 if got the entire house in his share by virtue of deed dated 28.5.1964, then he was not in need of any document from the Gram Panchayat. If he could have asked for any deed from the Gram Panchayat then that deed could have been obtained from the Gram Panchayat by defendant no.2 by submitting that

originally the house was belonging to the plaintiff and defendant no.2 and has come in share of defendant no.2 by virtue of the partition deed dated 28.5.1964 Ex.A.2 but the Gram Panchayat could not have issued independent Patta in favour of defendant no.2 as issued for the land of Gram Panchayat.

It is also submitted that defendant no.1's father filed the suit for recovery of Rs.8100/- against the defendant no.2 and got the house attached in proceedings under Order 38 Rule 5 C.P.C. and therefore, the defendant no.2 submitted objection petition in the year 1965 and admitted the share of the plaintiff in the house to the extent of half, therefore, the proceedings of Patta appears to have been concocted one and were taken in back date. It is also submitted that defendant no.2 admittedly was never put in possession of the house, therefore, even the alleged agreement dated 28.5.1964 has not been acted upon by the plaintiff and defendant both and the said fact has not been correctly appreciated by the two courts below.

The plea of respondents was that the house was also included as the property of the partnership business and, therefore, with the dissolution of the partnership if house came in share of defendant no,2, then Ex.A.2 is the document evidencing the said division of firm and, therefore, could have been admitted in evidence to find out the nature of possession of the plaintiff after the deed dated 28.5.1964. It was also the case of the defendant that the plaintiff did not disclose and challenge the partition deed dated 28.5.1964 in his plaint, therefore,

also he was not entitled to challenge the partition deed dated 28.5.1964. The plaintiff himself admitted his signatures over the first deed dated 28.5.1964 but failed to prove that those signatures were obtained by fraud or deceitful means or by undue influence. Following substantial questions of law were framed by this Court while admitting the appeal on 12.12.1983:-

“(1) Whether the learned District Judge has made out a new case for the defendants that Ex.2 is a forged document specially when there was neither any pleading nor any evidence to this effect?

(2) Whether the finding of the learned District Judge that the signatures of the defendants on Ex.3 are forged and the finding that Ex.3 was made out on a blank piece of paper already signed by the defendants are incompatible?

(3) Whether the learned District Judge has ignored material evidence specially Ex.1 an admission of the defendant and also circumstantial evidence ?”

I considered the submissions of the learned counsel for the appellant and perused the record also.

It will be worthwhile to consider the substantial question of law no.3 before deciding substantial questions no.1 and 2 because of the reason that the appellant heavily relied upon the admission of defendant no.2 whereby defendant no.2 admitted the share of the plaintiff even upto 15.2.1965. This fact is most important because of the reason that it is admittedly case of both the parties that the plot in question was purchased by the plaintiff and defendant no.2 and both constructed

house over it, therefore, this house is joint property of the plaintiff and defendant no.2. The joint ownership continued till partition is proved. The burden to prove the partition is upon the person who is claiming partition. For partition and falling the entire house in the share of defendant no.2, the only document is the deed dated 28.5.1964, Ex.A.2. The admission of the defendant in objection petition filed by him in reply to proceeding for attachment of house in dispute is dated 15.2.1965. The admission is not in a private document but in judicial proceedings. The admission was also made in a proceeding which was initiated by none else than the father of the purchaser of the property from defendant no.2. The property was also sold by defendant no.2 to defendant no.1 son of the person whose money was due in defendant no.2 and who was knowing that defendant no.2 stated in the court that defendant no.2 has $\frac{1}{2}$ share only in the house in dispute as on 15.2.1965. Therefore, the persons who are involved in dealing with the immovable property, the house, are the defendant no.1 and his father and the seller, the co-owner of the house in dispute. Defendant no.1 and defendant no.2 filed the joint written statement wherein defendant no.1 took a plea that defendant no.1 is not bound by the admission of defendant no.2 in the court proceedings initiated by defendant no.1's own father. Defendant no.2 even signed the pleading along with defendant no.1 wherein defendant no.1 stated that in case defendant no.2 has submitted in court that his share is $\frac{1}{2}$ only then that is false one. Defendant no.2 by signing the pleading along with defendant no.1

admitted that in the objection petition filed by him, he raised false objection in collusion with the plaintiff. This conduct of defendant no.2 cannot be taken lightly. There is no explanation in the written statement of defendant no.2 about his own admission admitting the plaintiff's share. Therefore, defendant no.2 did not withdraw the admission nor he could have withdrawn it. So far as the allegations of collusion between the plaintiff and defendant no.2 and submitting the objection by defendant no.2 in the defendant no.1's father's suit for recovery of money are concerned, they are not only vague but exposes the conduct of defendant no.1. Defendant no.1 also did not disclose all the facts how and why the property which was sought to be attached by his own father, was purchased by him without obtaining the consent of the plaintiff. Both the defendants miserably failed to explain what was the necessity of obtaining the Patta from the Gram Panchayat when the plaintiff and defendant no.2 were owners of the house in dispute and the house in dispute fell in the share of defendant no.2. It appears from the Patta Ex.A.1 that the Patta was obtained by defendant no.2, not on the basis of the title vesting in defendant no.2 by virtue of the sale-deed dated 5.10.1959 by which the plot in dispute was purchased. In the Patta it is mentioned that the Patta has been granted of the land to defendant no.2 whereas admittedly years before issuance of the Patta, the plaintiff and defendant jointly constructed the house over the land in dispute. The Patta has been issued in favour of defendant no.2 after charging cost of the land amounting to Rs.164.15. Whey defendant no.1

paid the cost of the land when he was already owner of the property, has not been explained by defendant no.1 and defendant no.2 both.

Defendant no.1, if relied upon the Patta Ex.A.1 only and purchased the property, then he cannot be a bonafide purchaser because of the simple reason that he did not enquire about the title of the property nor about the actual factual possession because of the reason that the Patta is of the land whereas he purchased the house.

In view of the above reasons, the two courts below miserably failed in deciding the suit by not giving due weightage to the admission of defendant no.2 admitting the unity of title and vesting the house in plaintiff and defendant no.2 with half share each. Defendant no.1 independently could have pleaded that he is not bound by the admission of defendant no.2 made in another suit but the admission of defendant no.2 is binding upon defendant no.2 and he himself could not have executed the deed contradicting his own admission in judicial proceedings. The first appellate court observed that defendant no.2 was hard pressed because of the proceedings for attachment of the house, therefore, said admission cannot be used against defendant no.2. The first appellate court also held that the plaintiff himself did not submit the objection petition against attachment of the house, if his share in the house was sought to be attached. The reasons given by the first appellate court are not reasons given by the defendants. While giving those reasons, the first appellate court again failed to look into all the circumstances in which the property was purchased by defendant no.1

which are of filing of the suit for recovery of money by defendant no.1's father against defendant no.2, obtaining the order of attachment before judgment for the house in dispute and filing of the objecting petition by defendant no.2 admitting plaintiff's share and thereafter obtaining Patta in the name of defendant no.2 for the entire house projecting partition without delivery of possession from defendant no.1 and selling the house to defendant no.2 and purchasing the house by defendant no.1, speaks loudly against the defendant no.1 and defendant no.2 and plea of the defendant that defendant no.2 was hard pressed because of attachment before judgment, he took a false plea admitting the share of the plaintiff. The admission of defendant no.2, therefore, was wrongly rejected by the two courts below. In view of the said admission of defendant no.2 that the plaintiff has $\frac{1}{2}$ share, sale of the entire house by defendant no.2 against the interest of the plaintiff is null and void and is of no effect.

The substantial question no.3 is, therefore, decided in favour of the appellant.

In view of the above finding that the property was admitted to be joint by defendant in the year 1965, therefore, Ex.A.2 produced by the defendant is of no consequence and cannot be relied upon. It will be further worthwhile to mention here that Ex.A.2 was also misread by the two courts below, if it was accepted as partition deed or memorandum of partition then, admittedly, the deed has not been executed on stamp papers. If it was a deed of dissolution of firm (which is not the case of

any party) then also it is not on stamps. It is not the case of defendant no.2 that the house was put in common hotchpotach of the partnership business property so that it could have been given in share at the time of dissolution of firm. The plaintiff and defendant both admitted that they purchased the plot and constructed the house and they were occupying their share in the house with separate portions for each and they continued their independent business after end of the joint business from the house, therefore, Ex.A.2 could not have been admitted to recognise the passing of the title of half of the share of the plaintiff in favour of defendant no.2. The document also could not have been admitted for declaring title of the defendant and for the purpose of extinguishing the title of the plaintiff because that is not the admission of the document for collateral purpose. In view of the very foundation of title and right to sell the entire house by defendant no.2 in favour of defendant no.1 falls to the ground. Therefore, the finding on Ex.3 becomes irrelevant. Therefore, there is no need to decide substantial question nos. 1 and 2.

In view of the above, the appeal is allowed and the judgment and decree dated 5.8.1983 passed by the District Judge, Merta and the judgment and decree dated 11.8.1976 passed by the Addl.Munsif, Merta are set aside. The suit of the plaintiff is decreed and it is held that the sale-deed (Patta) dated 1.1.1965 issued by the Gram Panchayat in favour of defendant, Ex.A.1 and the sale-deed dated 29.3.1965 executed by defendant no.2 in favour of defendant no.1 to the extent beyond half

share of defendant no.2 is declared null and void against the interest of the plaintiff-appellant.

The preliminary decree is passed and it is declared that the plaintiff has half share in the house property. The plaintiff is entitled to separate possession after division of the property by metes and bounds. The plaintiff is also entitled to cost throughout, suit and appeals.

The trial court shall proceed for final decree in accordance with law expeditiously without any further delay.

(PRAKASH TATIA),J.

mlt.